

**No. 5:10-CV-584-F**

## ORDER

Case 5:10-cv-00584-F Document 9 Filed 02/07/11 Page 1 of 3

Judge Walczyk arose during state domestic relations proceedings. However, the undersigned acknowledges that the gravamen of Benzing's complaint springs, not from the subject matter of the proceedings in state court, but rather from Judge Walczyk's alleged conduct. That the court proceedings concerned domestic law rather than some other controversy is not relevant to the conclusion that neither named defendant is subject to suit in federal court on the grounds alleged.

Accordingly, having conducted a thorough and *de novo* review of the full record herein, the M&R, and Benzing's Objections thereto, **the court hereby MODIFIES the M&R by substituting the following language, beginning with the first paragraph on page 2:**

Municipal entities such as Wake County "do not enjoy absolute immunity under the Eleventh Amendment," *Weller v. Dep't of Social Servs.*, 901 F.2d 387, 398 (4th Cir. 1990), and thus may be sued under § 1983. *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). Municipalities cannot be held liable under a theory of *respondeat superior* for the constitutional violations of their employees acting within the scope of their employment. *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987). A § 1983 plaintiff therefore must adequately plead and ultimately prove three elements: (1) the existence of an official policy or custom (2) that is fairly attributable to the municipality (3) that proximately caused the underlying constitutional violation. *See, e.g., Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994). To establish municipal liability in an action under § 1983 for unconstitutional acts by a municipal employee below the policymaking level, "a plaintiff must show that the violation of his constitutional rights resulted from a municipal policy or custom." *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996). Benzing has not alleged any harm arising from an official policy or custom fairly attributable to Wake County. *See Los Angeles County, Cal. v. Humphries*, \_\_\_\_ U.S. \_\_\_\_, 131 S. Ct. 447, 450 (2010).

Moreover, defendant Judge Christine Walczyk enjoys absolute judicial immunity under the facts alleged in the Complaint. *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984); *see also Green v. North Carolina*, No. 4:08-CV-135-H, 2010 WL 3743767 (E.D.N.C. Sept. 21, 2010) (citing *Dean v. Shire*, 547 F.2d 227, 231 (4th Cir. 1976) (a judge may not be attacked for exercising judicial authority, even if done improperly)).

The court ADOPTS the M&R *as modified*, and hereby ORDERS that, although Benzing's motion to proceed *in forma pauperis* is ALLOWED, this action is DISMISSED pursuant to 28 U.S.C. § 1915 (e)(2).

SO ORDERED.

This the 7<sup>th</sup> day of February, 2011.

  
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JAMES C. FOX  
Senior United States District Judge